Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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NO. 80-1749

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF AMICI CURIAE SOUTHERN COMPANY SERVICES, INC. ALABAMA POWER COMPANY GEORGIA POWER COMPANY GULF POWER COMPANY MISSISSIPPI POWER COMPANY IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

This brief presents the question whether the Tenth Amendment protects State regulatory authorities from being required by Congress to conduct hearings on retail ratemaking and service standards and implement rules requiring electric utilities to purchase power from other producers pursuant to the Public Regulatory Policies Act of 1978.

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THE STATE OF MISSISSIPPI, ET AL.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI AND DESCRIPTION OF THE RELEVANT STATUTE

Southern Company Services, Inc. is a subsidiary of The Southern Company, a holding company organized pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C.A. §§ 79-79z-6 (1971) (the "Holding Company Act"), and which owns four vertically integrated electric utilities in the Southeastern United States. These four utilities, Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, referred to herein as the operating companies, are also *amici* on this brief. Letters of consent to this filing have been received from counsel for the parties by the Clerk of this Court.

The operating companies serve approximately 2.5 million retail customers in Alabama, Florida, Georgia and Mississippi.

Their combined assets total over 12 billion dollars, making The Southern Company one of the largest electric utility systems in the nation. Southern Company Services, Inc. is responsible for insuring properly integrated planning and operations and provides technical engineering expertise and other services to the operating companies at cost pursuant to Section 13 of the Holding Company Act. *Id.* § 79m.

Each of the operating companies is overseen by a State regulatory authority with jurisdiction over intrastate retail operations. The actions of the Mississippi Public Service Commission ("MPSC"), which oversees the activities of Mississippi Power Company, are responsible for the litigation before this Court, challenging the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 26, 30, 42 and 43 U.S.C.A.) ("PURPA"). This statute is part of the energy legislation Congress passed in response to growing concerns about the United States' dependence on foreign oil. PURPA is composed of six titles, though portions of only three of those titles have been challenged in this litigation.

Amici curiae herein focus on the constitutionality of Titles I and II of PURPA. Title I requires State regulatory authorities to conduct public hearings on various ratemaking and service standards established by Congress. See Sections 111, 113, and 114, codified at 16 U.S.C.A. §§ 2621, 2623, and 2624 (Supp. 1981). Title II, Section 210 requires State regulatory authorities to conduct public hearings and implement regulations established by the Federal Energy Regulatory Commission ("FERC") governing cogeneration and small power production.[1] *Id.* § 824a-3 (hereinafter collectively referred to as "cogeneration"). Among these rules is a requirement that electric utilities purchase power from cogenerators.

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[1]"Cogeneration" refers to a steam process whereby steam produced for industrial purposes is also used for electric generation. "Small power production" refers to the use of renewable resources such as biomass and water to generate electricity. 16 U.S.C.A. § 796 (Supp. 1981).

These provisions of PURPA are of grave concern to the *amici* for several reasons. First, the provisions of both Title I and Title II require State regulatory commissions to hold extensive hearings regarding the numerous standards set forth in PURPA. These demands have severely taxed the limited resources of many State regulatory commissions, particularly for States in the southeast region which generally have lower per capita incomes and lower levels of funding for all areas of state government, including utility regulation. Those State commissions, operating on budgets which barely enable them to carry out their obligations under State law, cannot be expected to meet the additional requirements under PURPA without an adverse effect upon the performance of their other duties.

Amici also are affected by the requirements in Section 210 that the State regulatory machinery implement Congressional and FERC policy, for encouraging cogeneration. Congress and FERC have adopted a policy designed to force electric utilities to purchase power from cogenerators.

SUMMARY OF ARGUMENT

The Public Utility Regulatory Policies Act of 1978 ("PURPA") is unconstitutional as a violation of the Tenth Amendment. Sections 111, 113, 114 and 210 of PURPA impose obligations on State regulatory authorities in considering retail ratemaking and service standards and force the States to implement a federal program to encourage cogeneration. *See* 16 U.S.C.A. §§ 2621, 2623, 2624, 824a-3 (Supp. 1981). These requirements are proscribed under a three-part test established in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 49 U.S.L.W. 4654 (June 15, 1981), for identifying Tenth Amendment violations.

Appellant does not contest that part one is satisfied in that PURPA regulates the "States as States." The commands of the statute require regulatory action from State administrative officers.

Under part two of the *Virginia Surface Mining* test, PURPA addresses "indisputable attributes of State sovereignty." PURPA directs how State administrators shall manage internal State agency resources by mandating that States conduct public hearings on ratemaking and service standards and implement cogeneration regulations. *National League of Cities v. Usery*, 426 U.S. 833 (1976). Moreover, under Section 210, PURPA forces State instrumentalities to serve as agents for the Federal Energy Regulatory Commission ("FERC") in a federal program to require electric utility companies to purchase power from cogenerators.

The third part of the test looks to see whether PURPA "directly impairs the ability of States to structure integral operations in areas of traditional functions." PURPA does so because it displaces the power of State regulatory authorities to structure State agency affairs, in fulfillment of their State-imposed statutory obligations, with federal requirements. *Id.* at 845, 848-49. In addition, Section 210 compels State implementation of substantive FERC rules governing cogeneration in direct displacement of State prerogative to use regulatory power as it deems necessary.

Finally, PURPA operates in an area of traditional functions because government has traditionally been the administrator of public regulatory law, *id.* at 851, especially where the regulation is viewed as required by the citizens. *Id.* at 847. Moreover, this Court has already stated that the governmental service of regulating electric utilities is "necessary to protect the consumer." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976).

While there may be situations in which Tenth Amendment values are subordinated, such as an economic emergency or national security crisis, PURPA was not enacted under such circumstances. There must be a strong nexus between the impairment of State sovereignty in the legislative action undertaken and the national interest advanced. *See Fry v. United States*, 421 U.S. 542 (1975); *Peel v. Florida Department of*

Transportation, 600 F.2d 1070, 1084 n.16 (5th Cir. 1979). Without such nexus, the claims of national security and the response to emergency could become an excuse for federal government abuse. The time available for action in dealing with the energy shortage addressed in PURPA was admittedly several years away. Alternative courses of action, such as optional State participation and complete federal regulation or deregulation, belie the legitimacy of the need for exercising emergency powers.

These conclusions of constitutional law do not conflict with the Supremacy Clause which merely provides a rule of decision for resolving conflicts of law between otherwise legitimately exercised federal power and State enactments. In contrast, the Tenth Amendment determines the legitimacy of the exercise of a power granted Congress, and thus operates on a distinctly different plane of constitutional analysis.

Moreover, the Supremacy Clause does not authorize Congress to impose judicial responsibility on State regulatory officers under Section 210 in the same fashion as such responsibility may be imposed on State judicial officers. State regulators have legislative responsibilities which may be impaired by the imposition of federal judicial responsibility. Finally, the Supremacy Clause does not authorize the enlargement of State regulatory jurisdiction to force electric utilities to purchase power from cogenerators, as Section 210 contemplates.

As a matter of constitutional policy, Congress should not be allowed to divorce the limitations of cost for federal programs from the establishment of national legislative policy as it has done in PURPA. Such a separation invites irresponsible use of legislative power because Congress can force its regulatory burdens on the State regulatory authorities. PURPA reflects this kind of infirmity in imposing obligations on the States, and should be declared unconstitutional as a violation of the Tenth Amendment.

ARGUMENT

I. THE TENTH AMENDMENT PROHIBITS CONGRESSIONAL USE OF THE COMMERCE POWER TO STRUCTURE THE OPERATIONS AND DETERMINE THE GOVERNING REGULATIONS OF A STATE AGENCY CHARGED BY ITS STATE LEGISLATURE WITH ADMINISTERING STATE LAW.

The Tenth Amendment is a limitation on Congressional exercise of the Commerce Power. *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 49 U.S.L.W. 4654 (June 15, 1981).[2] A "truism"[3] not to be overlooked, the Tenth Amendment represents a "constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

Virginia Surface Mining clarifies the elements to be shown to prevail on a Tenth Amendment challenge:

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[2]The Commerce Power allows Congress "[t]o regulate commerce with foreign nations, and among the several States . . . ." *U.S. Const.* art. I, § 8, cl. 3. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, now prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* at amend. X.

When a Tenth Amendment challenge is raised in litigation, "the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." *Fry v. United States*, 421 U.S. 542, 553 (1975) (Rehnquist, J., dissenting). *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 49 U.S.L.W. 4654, 4659 (June 15, 1981).

Amici in no way concede that Congress has an affirmative grant of legislative power to enact PURPA. There is significant precedent that Congress may not rely on authority found within the Commerce Power to coerce States where the States are engaged in governance rather than commerce. *Brown v. Environmental Protection Agency*, 521 F.2d 827, 839 (9th Cir. 1975); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *Amici* support the position of *Amicus* Southeastern Legal Foundation that Congress lacks an affirmative grant of legislative power, including that found in the Commerce Power, to enact PURPA.

[3]*United States v. Darby*, 312 U.S. 100 (1941).

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

49 U.S.L.W. at 4660 [citations omitted]. In certain limited situations, "the nature of the federal interest advanced may be such that it justifies State submission." *Id.* at 4660 n.29; *see Fry v. United States, supra.*

The instant challenge to Title I and Section 210 of PURPA should be sustained under the Tenth Amendment jurisprudence articulated in *Virginia Surface Mining* and *National League of Cities.*

A. PURPA Regulates The "States As States" Because Its Terms Require Action From State Legislatures Or Agencies.

There is no serious question that PURPA is an application of Congressional power against the "States as States." Appellants do not defend the statute on this basis. While various *amici* contend that PURPA does not regulate "States as States," a cursory reading of the statute shows this argument to be spurious.

Where the State legislature or its agency is the entity actually regulated by federal statute, Congressional power has been directed at the "States as States." *National League of Cities, supra,* at 845. If the commands of a federal statute require regulatory action from State regulatory authorities, rather than private individuals or businesses, it is ludicrous to claim a statute is not directed at the "States as States."

The text of PURPA makes it clear that "States as States" are being regulated. Section 111 provides: "Each *State regulatory authority* . . . shall consider each standard established by sub-

section (d)[4] and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. . . . The consideration. . . . shall be made after public notice and hearing." 16 U.S.C.A. § 2621(a) & (b) (Supp. 1981) [emphasis supplied]. Section 113 provides: "[E]ach *State regulatory authority* . . . shall provide public notice and conduct a hearing respecting the standards established by subsection (b). . . ."[5] *Id.* § 2623(a) [emphasis supplied]. Finally Section 114 requires that "the *State regulatory authority* . . . shall determine, after an evidentiary hearing, whether . . . a [lifeline] rate[6] should be implemented by such utility." *Id.* § 2624(b) [emphasis supplied]. Section 123 empowers courts to enforce the requirements of Title I against State regulatory authorities: "Any person . . . may bring an action to enforce the requirements of this chapter in the appropriate State court," . . . *Id.* § 2633(c).

The States are also regulated as States by Section 210. Under Section 210(f): "[E]ach *State regulatory authority* shall, after notice and opportunity for public hearing, implement such rule [as adopted by FERC to encourage cogeneration] . . . for each electric utility for which it has ratemaking authority." 16 U.S.

[4]PURPA § 111 (d) sets forth six standards for retail ratemaking by State regulatory authorities. They are: (1) reflection of cost of service for each class of consumers to maximum extent practicable, (2) limitation of the use of declining block rates which allow the variable cost component of rates to decrease as consumption increases, (3) establishment of rates reflecting cost of service at different times of the day, (4) establishment of rates reflecting cost of service during different seasons of the year, (5) establishment of rates reflecting the cost of providing interruptible service, and (6) offering load management techniques to consumers designed to reduce demand on the utility. *Id.* § 2621 (d).

[5]Subsection (b) of Section 113 of the federal law sets forth five standards for electric utility regulation by State regulatory authorities. They deal with: (1) prohibition of master metering, (2) minimal standards for automatic adjustment clauses, (3) transmission of rate information to consumers, (4) minimum procedures for terminating electric service, and (5) prohibition on recovery of costs from consumers for certain kinds of advertising. *Id.* § 2623 (b).

[6]A lifeline rate is one that is below the cost of service and is designed to provide for the essential needs of residential electric consumers. *Id.* § 2624 (a) and § 2621 (d) (1).

C.A. § 824a-3 (Supp. 1981) [emphasis added]. Enforcement is provided in Section 210(h):

> The [Federal Energy Regulatory] Commission may enforce the requirements of subsection (f) . . . against any *State regulatory authority*. . . . For purposes of any such enforcement, the requirements of subsection (f)(1) shall be treated as a rule enforceable under this chapter. [The Federal Power Act]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of this chapter.

Id. § 824a-3(h)(2); *see id.* § 825p (providing for federal court jurisdiction for violation of the Federal Power Act). With good reason, Section 210 should be said to commandeer "the States by directly compelling them to enact and enforce a federal regulatory program." *Virginia Surface Mining, supra,* at 4660.

Even if Congress was aiming ultimately at private entities in PURPA,[7] there is no escaping the requirements and sanctions directed at the States. The requirements are far different from the provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §§ 1201-1328 (Supp. 1981), which acted on States as federal participants, and which this Court discussed in *Virginia Surface Mining, supra.* There the statute set minimum criteria for *optional* State participation in a federal regulatory scheme. It operated on the Secretary of the Interior in accepting States that wished to participate. *Id.* § 1253.

The Court also considered provisions of the Surface Mining Act that acted only against private persons subject to dual sovereigns. *Virginia Surface Mining, supra,* at 4660; *Hodel v. Indiana,* 49 U.S.L.W. 4667 (June 15, 1981). In *Virginia Surface Mining,* the Court noted that, "[T]he steep-slope provisions of the Surface Mining Act govern only the activities of coal mine operators who are private individuals and businesses." *Virginia Surface Mining, supra,* at 4660. Again, in *Hodel v. Indiana,* the Court concluded the prime-farmland provisions of the Surface Mining Act did not regulate the States as States:

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[7]Brief of *Amici* Windfarms, Ltd., *et al.* at 15-16; Brief of *Amici* State of Maryland, *et al.* at 14-15.

> Like the provisions challenged in *Virginia Surface Mining*, the sections of the Act under attack . . . regulate only the activities of surface mine operators who are private individuals and businesses, and the District Court's conclusion that the Act directly regulates the States as States is untenable.

Hodel v. Indiana, supra, at 4671. None of the statutory provisions of the Surface Mining Act addressed in these two cases dealt with action required from the State legislature or its agencies and hence neither case found action against "States as States." Congressional preemption of State regulatory power over private individuals is not action on the "States as States" under either *Virginia Surface Mining* or *Hodel v. Indiana*.

Preemption of State law acts on "Judges" and not on "States as States." As in the provisions disputed in *Virginia Surface Mining*, Congress merely provides rules to govern private conduct in the exercise of its Commerce Power. Under Article VI, clause 2 of the Constitution (the "Supremacy Clause"), this rule becomes a rule of decision for "Judges" subject to the strictures of the Supremacy Clause.[8]

The Supremacy Clause, therefore, requires Judges to apply federal law in preference to State law in adjudicating the rights of private citizens necessarily subject to dual sovereigns. By its terms, there is no power under the Supremacy Clause to act on "States as States." Instead, its effect is merely to suspend judicial application of State law during the period in which the federal law applies. *See Butler v. Goreley*, 146 U.S. 303 (1892). Thus, in preemption cases, Congress does not "commandeer the legislative process of the States," or their administrative processes. *Virginia Surface Mining, supra*, at 4660.

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[8]In article VI, the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, Cl. 2.

Hence, nothing in *Virginia Surface Mining* suggests that PURPA does not regulate "States as States."

B. PURPA Addresses Matters Which Are Indisputable Attributes Of State Sovereignty Such As The Management Of State Agency Affairs, And The Determination Of Whether State Instrumentalities Will Be Used For Implementing Policies.

1. Title I deals with the management of State agency affairs in the administration of State regulatory laws by requiring public hearings be held by State agencies.

The administration of State regulatory laws is an indisputable attribute of State sovereignty in the federal system. *National League of Cities v. Usery*, 426 U.S. 833 (1976); *see Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 49 U.S.L.W. 4654 (June 15, 1981).[9] The manner in which the administration of regulatory operations is structured is indisputably an attribute of sovereign authority over those operations. Hence, a command to conduct hearings on standards for regulatory operations addresses an attribute of sovereignty.

"Sovereignty" has been defined as "paramount control of the constitution and frame of government and *its administration*." *Black's Law Dictionary* 1252 (5th ed. 1979) [emphasis supplied]. Sovereignty for a State is not destroyed merely because it becomes a member of a Federal Union. "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869). "A State . . . is itself a coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities v. Usery, supra*, at 849.

"The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission. . . ."

[9] All that need be shown under this requirement is that an "indisputable attribute of state sovereignty" is addressed by PURPA. The test in *Virginia Surface Mining* says nothing about the need for the attribute to be "essential." *Cf.* Brief of Appellant at 30.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 210 (1814). "In the states, there reposes the sovereignty to manage their own affairs. . . ." *Madden v. Kentucky*, 309 U.S. 83, 93 (1940). The principle is well-recognized in the context of the affairs of State agencies. *Rizzo v. Goode*, 423 U.S. 362, 378-80 (1976). *National League of Cities* similarly noted:

> One undoubted attribute of State sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

426 U.S. at 845. State sovereignty therefore encompasses the allocation of resources in the fulfillment of State policy.

PURPA's Title I requires State regulators to manage State regulatory resources so that they can hold hearings on twelve different federal standards for retail ratemaking and service. 16 U.S.C.A. §§ 2621(a) & (b),[10] 2623(a),[11] 2624(b).[12]

Congressional establishment of deadlines in the required hearings makes clear the relationship of PURPA to the management of State regulatory authorities. Hearings on the six Section 111 standards must be completed by November 9, 1981. The deadline for completed hearings on the five Section 113 standards was November 9, 1980.[13] In light of these deadlines, there can be no doubt that Title I of PURPA addresses management of State agency affairs and the allocation of resources in fulfillment of State policy. As such, Title I of PURPA addresses matters which are indisputable attributes of State sovereignty.

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[10] *See* note 4, *supra*.

[11] *See* note 5, *supra*.

[12] *See* note 6, *supra*.

[13] The standard for lifeline rates does not have a specific deadline for completion of State consideration.

2. Section 210 assumes management of State agencies, and also displaces the State's prerogative to determine whether its instrumentalities will be used to implement policies.

Section 210 addresses the management of State agency affairs by requiring public hearings, and by determining whether a State agency or instrumentality will be used to implement policies. Thus, it also addresses a matter which is indisputably a matter of State sovereignty.

Section 210(f) provides: "[E]ach State regulatory authority shall, after notice and opportunity for public hearing, implement such rule [as adopted by FERC to encourage cogeneration] . . . for such electric utility for which it has ratemaking authority." 16 U.S.C.A. § 824a-3. As in Title I, in Section 210, Congress addresses the power to hold hearings on ratemaking matters. The Section 210 hearing requirement, therefore, also deals with the indisputable sovereign right of the State to manage State agency resources. *See* discussion of sovereignty, at pp. 11-12, *supra.*

Congress addressed a matter of State sovereignty in requiring use of a State agency for execution of its policy. *See McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 159 (1814). More recently, this Court has noted that: "The power to contract and the power to select appropriate agencies and instrumentalities for the execution of state policy are attributes of State sovereignty." *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 526 (1937).[14] Moreover, Congress again is addressing the management of State agency resources in enlisting the State as administrator of national policy.[15]

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[14]In Section 210, Congress goes further than in Title I. PURPA predetermines what will be State policy with respect to cogeneration and further determines the means through which that policy shall be implemented.

[15]The process of adopting the cogenerator rules is also an attribute of State sovereignty. The prerogatives in devising such a process and the decision to adopt are closely linked to sovereign State powers already recognized by this Court. In *Coyle v. Oklahoma,* 221 U.S. 559, 565 (1911),

Under *McCulloch* and *Carmichael*, selection of the agency or instrumentality for policy implementation addresses an attribute of State sovereignty. Under Section 210 the State is denied the right to choose alternative means of policy implementation, such as courts of general jurisdiction. 16 U.S.C.A. § 824a-3(f)(1). As such, Section 210(f) addresses an indisputable attribute of State sovereignty, and Tenth Amendment scrutiny of PURPA must proceed.

C. PURPA Impairs The Ability Of States To Structure Integral Operations Because It Displaces The Administrative Policy-Making Discretion Of State Regulatory Authorities.

The ability to structure integral operations is impaired where State government officials are deprived of their policy-making discretion. The policy-making role of State government officials is "essential to separate and independent existence" for the States. *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911) *quoting from Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). Such policy-making discretion symbolizes "the States' integrity" and is vital to "their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. at 547 n.7.

Where federal law "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," Federalism may be in serious jeopardy. *Virginia Surface Mining*, 49 U.S.L.W. at 4660 *citing Maryland v. EPA*, 530 F.2d 215, 224-28 (4th Cir. 1975), *vacated and remanded sub nom., EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971, 990-94 (D.C. Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837-42 (9th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977). Such commandeering

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the Court said, "The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers." By analogy, the power to adopt rules and laws is a sovereign State power that resides in the legislature or its delegate. *See Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977).

"directly supplants the considered policy choices of the States' elected officials and administrators. . . ." *National League of Cities*, 426 U.S. at 848.

The integrity of the State extends to administrative decision-making. "A federal regulation which compels the states to enforce federal regulatory programs clearly 'impairs the States' integrity' and 'their ability to function in a federal system'." *District of Columbia v. Train*, 521 F.2d at 994 (holding Clean Air Act regulations invalid because "they require states to administer and enforce federal regulatory programs and thus exceed constitutional power under the commerce clause." *Id.*). The preservation of State administrative discretion is as important to the role of States in the federal system as is the decision to convene the State legislature. *National League of Cities*, 426 U.S. at 845, *citing Coyle v. Oklahoma*, 221 U.S. at 565. *National League of Cities* struck down the 1974 Amendments to the Fair Labor Standards Act because State officials were denied the discretion to set wages for State employees. The Court said:

> [T]he federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment. . . . The only "discretion" left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying the congressionally prescribed wages to their existing complement of employees, or to reduce that complement to a number which can be paid the federal minimum wage without increasing revenue. . . .
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> This congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs.

Id. at 848-49.[16]

[16]The mere fact that a State is already engaged in electric utility regulation does not alter the fact that PURPA impairs the ability to structure integral operations. Even within the existing regulatory body, PURPA reorders State priorities and displaces State policy-making power. *Cf.* Brief of Appellant at 35.

As in *National League of Cities*, the MPSC has no choice under Title I and Section 210 but to increase revenues or to restructure the other services it provides. *See* "Motion for Summary Judgment by State of Mississippi," Exhibit 1, *Jt. App.* at 64. The requirements of these provisions invade the policy-making discretion of State regulators to establish priorities in the use of State regulatory resources. In Title I, Congress requires that hearings on ratemaking and service standards be held, and does so without regard for the degree to which the hearings interfere with State-established ratemaking responsibilities. In fact, Section 111 standards *must be considered during a ratemaking proceeding* if action on them has not been completed by November 9, 1981. In Section 210, Congress compels State enactment and enforcement of a federal regulatory program relating to cogeneration. This impairs the States' integrity and their ability to function in a federal system under the *Train* dictum. Moreover, as federal compulsion of State officers supplanted State policy-making prerogative in *National League of Cities*, this Court should find that the States' ability to structure integral operations has been supplanted by PURPA.

The presence of an economic impact on the States in complying with PURPA is not necessary to a finding that PURPA directly impairs the States' ability to structure integral operations. In *National League of Cities*, "the determinative factor . . . was the nature of the federal action, not the ultimate economic impact on the States." *Virginia Surface Mining*, 49 U.S.L.W. at 4661 n.33. *National League of Cities* makes clear that "[q]uite apart from the substantial costs imposed upon the States," PURPA may directly impair the States. 426 U.S. at 847.

PURPA's direct impairment of the States' ability to structure integral operations is therefore its assumption of State policy-making discretion and its interference with the establishment of priorities in matters of State regulatory responsibility.

D. State Administration Of Regulatory Law In Oversight Of Electric Utility Activities In The Public Interest Is An Area Of Traditional Governmental Functions.

Governments are created to administer the public law. *Id.* at 851. Governments have traditionally afforded their citizens the service of discharging this function. *Id.* The administrative process associated with regulatory laws and engaged in by administrative agencies such as State regulatory authorities is therefore a traditional governmental function under the teaching of *National League of Cities.*

State government administration of public law is even more clearly a traditional function where it provides "those governmental services which their citizens require." *Id.* at 847. Regulation of electric utilities is the kind of administrative activity traditionally thought of as "required" because the "public interest" is at stake. *See Munn v. Illinois,* 94 U.S. 113 (1876). As this Court itself noted, "[P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer. . ." *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 595-96 (1976). State public service commissions traditionally have been created to administer regulatory statutes and oversee the activities of private companies performing public service activities so that performance in the public interest is assured. *See* K. Jones, "Origins of the Certificate of Public Convenience and Necessity: Development in the States, 1870-1920," 79 *Colum. L. Rev.* 426 (1979). In proposing a less intrusive version of PURPA, the Senate Committee on Energy and National Resources acknowledged that electric utility regulation is a traditional government function performed by the States. S. Rep. No. 95-442, 95th Cong., 2d Sess., at 9, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 7903, 7906.

MPSC oversight of electric utility activities in the public interest is therefore an area of traditional governmental functions. The MPSC has long been involved in the administration of

public law. Moreover, it administers regulation of private companies traditionally thought to be in need of regulation for the protection of the consumer. In light of this role in governance, this Court should find that State regulation of electric utilities is an area of traditional governmental functions.

II. THE PROVISIONS OF TITLE I AND SECTION 210 DO NOT ADDRESS THE KIND OF ECONOMIC EMERGENCY OR NATIONAL SECURITY CRISIS DURING WHICH FEDERALISM MAY BE COMPROMISED.

Only in limited response to an economic emergency or in close connection with a national security crisis should *National League of Cities* and *Virginia Surface Mining* be deemed not controlling. In either event, a Congressional response that implicates the Tenth Amendment must be well-tailored to meet the problem.

When addressing an emergency situation, statutes otherwise flawed may be acceptable, despite the Tenth Amendment, if certain specific criteria are met. *Fry v. United States*, 421 U.S. 542 (1975) holds the Tenth Amendment is not violated where a Congressional enactment, pursuant to the Commerce Power, is "an emergency measure to counter severe [economic problems] . . . that threatened the national economy." *Id.* at 548. As with threats from abroad, the justification for an admitted interference with the Federal structure of the Union is the need for preservation of the constituent parts: "The well-being of all the component parts of our federal system" was endangered by the pressure of inflation on State Government budgets. *National League of Cities*, 426 U.S. at 853.

Fry held that the Economic Stabilization Act of 1970 was a constitutional exercise of the Commerce Power in empowering the President to freeze the wages of State government employees. Under the *Fry* "emergency" exception, the States had their freedom interrupted for only "a very limited, specific period of time," and the interference operated to reduce, rather

than increase pressures on State budgets. *Id.* at 853. During this period, the States were not forced to restructure governmental operations or remake policy choices. Finally, in *Fry*, this Court noted that "only collective action by the National Government might forestall" the dangers posed by the emergency. *Id.* at 853. Thus, there are several limits on the power of Congress to interfere with the States' integrity in dealing with economic emergencies.

The power of Congress to deal with national security matters also requires that there be a strong nexus between the action undertaken and the interest advanced when the Tenth Amendment is implicated. *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1084 n.16 (5th Cir. 1979). The need for a strong nexus cannot be understated.[17] Before the Tenth Amendment and Federalism are compromised, the need for coercion of the States should be closely linked with the problem the coercion addresses. Judicial acceptance of a weak nexus between the national security power and the action for which it is used would eviscerate Federalism. Federal action in the guise of National Security or War Power should not usher in dangerous governmental abuse. *See e.g., United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972), *citing United States v. Robel*, 389 U.S. 258, 264 (1967).

Proper exercise of the War Powers, *U.S. Const.* art. I, § 8, cls. 11-16, requires "a condition of which the war was a direct and immediate cause," *Woods v. Miller*, 333 U.S. 138, 144 (1948) (housing shortages caused by World War II); *see also Case v. Bowles*, 327 U.S. 92 (1946) (price controls during war time), or should be connected directly with the disposition of resources actually used in war. *See e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (manufacture of mu-

[17]There is some authority that the Tenth Amendment places absolute limits on the power to deal with national security. *See Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). The national government cannot change the character of a State government and cannot bargain away sovereign territorial rights of a State without the consent of the State involved. *Id.*

nitions); *Johnson v. Robison*, 415 U.S. 361 (1974) (benefits for soldiers after military service).[18]

The energy shortage problems addressed in PURPA were not the result of a previous war effort by the United States and did not arise on account of the need to stockpile materials in preparation for or pursuit of war. The United States was not at war in 1978. The country was already, and still is, stockpiling oil pursuant to another Congressional directive. *See* The Strategic and Critical Materials Stock Piling Act, 50 U.S.C.A. §§ 98-98h (Supp. 1981). Congress should and does have the power to act quickly in the interest of national security when the need arises. However, Congress should not be able to give more force to its domestic policies by invoking national security power in the absence of a crisis-like situation. When PURPA was enacted, it was assumed that energy shortages would arise several years in the future. The Ad Hoc Committee on Energy, established by the House of Representatives to formulate a comprehensive national energy policy, reported on July 27, 1977, that America's oil supply would become jeopardized by the mid-1980's. At that time, it was predicted that several years in the future, national security would be jeopardized. The Committee was aware that the dangers envisioned were still in the future:

> [B]ecause of the long lead times involved, the transition must be started now, so as to avoid serious future shocks to the Nation and to its economy from energy shortages. The benefits of having a more secure energy supply for the long term should more than justify the short term costs of a transitional program.

H. R. Rep. No. 95-543, 95th Cong., 2d Sess., at 7, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 7673, 7676.

Similarly, the Senate Committee on Energy and Natural Resources viewed PURPA as a long-range approach to curtailing electricity consumption:

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[18] *Cf.* Brief of *Amicus* Energy Law Institute at 25-30; Brief of *Amici* State of Maryland, *et al.* at 27-30.

> With most demand projections showing average annual growth of 5-6 percent in the electric energy consumption over the next decade, . . . electricity will contribute an increasing share of our domestic energy. . . . [E]lectricity's share of U.S. energy demand in the future will rise from 28 percent in 1974 to 37 percent in 1990.

S. Rep. No. 95-442, 95th Cong., 2d Sess., at 8, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 7903, 7905.

Current events bear out the long-range nature of PURPA's mandate. The oil supply picture is very different now from what it was in 1978. There is no evidence that partial implementation of the mandate to State regulatory authorities is responsible for the present abundant oil supply.[19] Foreign import prices have had to be curtailed in order to compete. The factors most responsible for the changing oil supply picture are personal conservation by the American people and legislative policies to decontrol price. *See, e.g.*, R. Hershey, "Winning the War on Energy: All the Old Predictions Were Wrong. Higher Energy Prices Have Spurred Big Gains in Fuel Conservation," *N.Y. Times*, October 11, 1981, § 3 (Business), at 1, col. 2.

The nature of the conditions confronting Congress in 1978 did not require the alteration in the balance of Federalism as enacted in Section 210. Section 210 contemplates the exploitation without limitation of State regulatory authorities for implementation of the FERC rules. It calls for a permanent use of the States as police agents in encouraging federal policy on cogeneration and small power production. By forcing the States to serve the will of Congress, Section 210 obliterates the distinctiveness of the States as separate entities from the national government.

Given the severe nature and length of Congressional disruption of the balance in Federalism, a stronger nexus must exist

[19]The average number of barrels of crude oil imported into this country daily was already dropping when PURPA was passed, from 6,594,000 in 1977 to 6,195,000 in 1978. Through August of 1981, the figure has dropped to 4,217,000. *Monthly Energy Review*, at 32 (Sept. 1981) (U.S. Dept. of Energy, Energy Information Administration).

between the need for Congressional action and the subjugation of the States. The imposition of administrative responsibility on the States is made without consideration for the extent of dependence on foreign oil. While the use of renewable energy resources and the efficient use of fuel in the cogeneration process are important goals, their potential for solving an energy emergency is limited. Clearly, they are long-range, not emergency, solutions. Alternatively, Congress might have chosen a more accelerated policy of oil price deregulation.

Congress might have chosen the alternative course of regulating relations between cogenerators and electric utilities through its own administrative agencies. It was not required by time constraints to impose on State administrative agencies. Forced State action was not the *only* course by which a collective National goal might be pursued. The problem facing Congress simply was not the kind of emergency that demanded State submission. The technique employed by Section 210, trying to encourage cogeneration by economic incentive, hardly evokes emergency response even if States were not involved.

Moreover, Congress might have provided for federal implementation with optional State implementation or created incentives for State implementation. *See, e.g., Steward Machine Co. v. Davis, supra.* Instead, Section 210 dictates State implementation. This increases pressures on the budgets of State regulatory authorities which are already overworked as a result of State-created regulatory responsibilities. The threat of judicial action for failure to implement the FERC's regulations under Section 210 is bullylike, undermines Federalism, in letter and spirit, and is outside the scope of any emergency exception, under the Commerce or national security power.

Similarly, the emergency exception has no application to the Title I requirement that States hold hearings on standards for ratemaking. There is no link between the "emergency" nature of the energy problem PURPA purports to address and the Title I hearing requirement. Under Title I, States are not required to change ratemaking practice. The possibility of divergent results following these hearings suggests, at a minimum,

that Congress did not view the ratemaking standards as necessary to deal with emergency energy problems. Further, PURPA creates additional pressures on State budgets. The Title I hearings drain resources from existing State-created ratemaking responsibilities. Under such circumstances, the "emergency" justification set forth in *Fry* is not applicable.

III. A DECISION THAT PURPA IS UNCONSTITUTIONAL UNDER THE TENTH AMENDMENT WOULD BE CONSISTENT WITH THE SUPREMACY CLAUSE.

A. The Supremacy Clause Is Not Properly An Issue In This Case.

The Tenth Amendment protects States from Congressional interference in the name of federal supremacy. It limits the application of Congressional power.[20] In contrast, the Supremacy Clause merely determines, as between conflicting rules of decision, that a "Judge" shall apply the federal rule. Because the Tenth Amendment determines that PURPA is not constitutional, there is no conflict between federal and State rules of decision to be resolved. Hence, the Supremacy Clause should be inoperative where Congress has exceeded its power in violation of the Tenth Amendment.[21] *See generally, United States v. Gillock*, 445 U.S. 360, 370 (1980).

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[20] *See* note 2, *supra*.

[21] Even the treaties entered by the national government and made applicable to the States by the Supremacy Clause are limited by the concerns of Federalism and the Tenth Amendment:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, *or a change in the character of the government or in that of one of the States*, or a cession of any portion of the territory of the latter, without its consent.

Geofroy v. Riggs, 133 U.S. 258, 267 (1890) [emphasis supplied]. Because treaties are limited by the concerns of Federalism, and are not permitted to ignore Tenth Amendment protections, the Supremacy Clause is

B. State Administrative Officers With Legislative Functions Should Not Be Deemed "Judges" Under The Supremacy Clause Because Judicial Responsibilities Thereby Imposed Would Impair The Performance Of State-Created Legislative Responsibilities.

The Supremacy Clause speaks only to "Judges." It requires them to resolve disputes regarding federal rights where state law has imposed a duty on State courts to resolve analogous state rights. *Mondou v. New York, New Haven & Hartford Ry. Co.*, 223 U.S. 1 (1912). Non-judicial officers and proceedings are beyond its terms. State legislative process is protected by the Tenth Amendment, as preemption under the Supremacy Clause does not give Congress power "to commandeer" State legislative process. *Virginia Surface Mining*, 49 U.S.L.W. at 4660. As such, a State administrative body with significant non-judicial, legislative responsibility cannot be required to undertake judicial responsibility for federal rights under the terms of the Supremacy Clause.

The term "Judge," as used in the Supremacy Clause, should not be extended to include State officials with legislative responsibility because such an extension may interfere with legislative responsibility. Administrative officials typically have both quasi-judicial and legislative responsibilities. An increase in their quasi-judicial responsibilities necessarily lessens their available time for exercise of legislative responsibilities. In contrast, a "Judge" under the Supremacy Clause typically has *only* judicial responsibility. The additional duties imposed on a judicial officer by the Supremacy Clause therefore do not detract from legislative responsibilities. An extension of the Supremacy Clause to impose federal judicial responsibilities on State administrative officers, however, will undermine their institutional capability to act legislatively and play their State delegated role in the formulation of State policy.

In the instant case, the State regulatory authority has the power to fix rates and promulgate prospectively-applied generic

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implicitly inoperative where a Tenth Amendment violation is shown to exist.

rules. *Miss. Code Ann.* §§ 77-3-41 to 45 (1973). As such, the MPSC is fully vested with legislative responsibilities under both Mississippi law, *Mississippi Public Service Commission v. Mississippi Power Company*, 337 So.2d 936 (Miss. 1976), and federal law, *United States v. Jones*, 336 U.S. 641, 652 (1949). Furthermore, the State legislature has not specifically entrusted it with the responsibility of forcing electric utilities to purchase power from cogenerators.

Both Title I and Section 210 place responsibilities on State regulatory authorities that undermine their role in the formulation of State policy through the exercise of their legislative powers. As noted above, Title I *and* Section 210 contemplate Congressional use of quasi-legislative State process either by consideration of ratemaking standards or by implementation of rules to govern the development of cogeneration. Moreover, any increase in judicial responsibility contemplated by Section 210 detracts from the ability of the State regulatory authority to exercise legislative responsibility.

In sum, this Court should limit the term "Judges" in the Supremacy Clause to offices without legislative responsibilities. PURPA's mandate to State regulatory authorities should not be allowed to stand under the Supremacy Clause where State legislative responsibilities may be displaced. Otherwise, Tenth Amendment protection of the State's legislative discretion will be inconsequential.

C. Concerns For Federalism Protect The States From Congressional Action Increasing The Jurisdiction Of State Tribunals Under PURPA.

Even if State officials with legislative responsibility are deemed "Judges" under the Supremacy Clause, they should not be required to undertake judicial responsibility outside their State-created jurisdiction. Federalism and the Tenth Amendment preserve the "power of a State to deny access to its courts to persons seeking recovery . . . [on federal claims] if in similar

cases the state for reasons of local policy denies resort to its courts and enforces its policy impartially. . . ." *Southern Railway Co. v. Mayfield*, 340 U.S. 1 (1951). The Supremacy Clause merely proscribes discrimination against federal claims in the granting of remedies where local jurisdiction is "adequate and appropriate under established local law to adjudicate" the action. *Testa v. Katt*, 330 U.S. 386, 394 (1947); *McKnett v. St. Louis & San Francisco R. Co.*, 292 U.S. 230 (1934); *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945).

The Supremacy Clause is not authority for Congress to enlarge the jurisdiction of state courts, or to create State courts, in order to resolve disputes regarding federal rights. *See Mondou v. New York, New Haven & Hartford Ry. Co.*, 223 U.S. 1 (1912). *Mondou* did not even address the question of Congressional power to enlarge the jurisdiction of State tribunals, contrary to the suggestion of the Brief of *Amicus* American Paper Institute at 16-17. The *Mondou* Court said of its decision:

> [T]here is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, *when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws,* to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure.

Mondou, supra, at 56-57 [emphasis supplied]. *Mondou* and the other cases cited above are perfectly consistent with the Federalism embraced by *National League of Cities* and *Virginia Surface Mining*. Where the State purports only to set prices for intrastate electric utility retail *sales*, the Supremacy Clause does not require there be additional jurisdiction to enforce *purchases* by electric utilities.

Mississippi has never attempted to require purchases of electricity by utilities from other electric suppliers, including cogenerators, as Section 210 contemplates. It has not previously

undertaken to resolve disputes surrounding purchases from cogenerators by electric utilities as the FERC regulations contemplate. *See* 18 C.F.R. § 292.401 (1980). State utility regulation accepts the "natural monopoly" characteristics of the electric industry. Regulatory jurisdiction is therefore based on the need to protect retail consumers from the extraction of "monopoly" profits in electric sales. State regulatory jurisdiction was never intended to require electric companies to make purchases of power, much less set the price at which the purchase must be made.

The jurisdiction of the MPSC is specifically limited to *intrastate* utility activities. *Miss. Code Ann.* § 77-3-5 (1973). It has no power to require purchases from interstate electric suppliers regulated by the FERC. *See United Gas Pipe Line Co. v. Mississippi Public Service Commission,* 241 Miss. 762, 133 So. 2d 521 (1961); *Texas Gas Transmission Corporation v. Mississippi Public Service Commission,* 241 Miss. 826, 133 So. 2d 526 (1961).

Section 210 demands MPSC implementation of federally-determined rules requiring purchases without regard to MPSC authority under State law, in an area where it was never intended to regulate. It is an unlawful, unconstitutional extension of the jurisdiction of a State tribunal, and MPSC failure to implement Section 210 therefore is not a violation of the Supremacy Clause.[22]

MPSC failure to conclude hearings on ratemaking standards pursuant to Title I is also consistent with the Supremacy Clause. Title I deals with the creation of generic rules for subsequent application to factual circumstances in ratemaking. No colorable claim can be made that the MPSC, in failing to conclude

[22] *Ex parte Siebold,* 100 U.S. 371 (1879), where State election officers voluntarily undertook to supervise federal elections and therefore to protect federal rights, is not to the contrary. Moreover, in the area of civil rights, where Congress has power under Section 5 of the Fourteenth Amendment to act by "appropriate legislation," the Tenth Amendment clearly does not operate with the same force as it does where Congress is acting under the Commerce Power. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *City of Rome v. United States,* 446 U.S. 156, 178-180 (1980).

hearings on the federal standards, is acting in a judicial capacity as the protector of federally-created rights. Instead, it is acting legislatively and is commissioned with the responsibility for exercising its discretion to regulate retail rates and practices of electric companies.

Nothing in the text of the Supremacy Clause mandates regulatory activity by the States. The Constitution does not therefore require administrative bodies, the delegates of State legislative power, to enact rules. Such Constitutional construction would contravene not only legislative prerogative, but also undermine state administrative process.

A mandate in the Supremacy Clause limiting State administrative discretion to forego initiation of rulemaking hearings would attack the heart of the State's independent existence. "The lifeblood of the administrative process" is informal discretionary action. K. Davis, *Administrative Law Text* § 4.01 (1972). States would be discouraged from delegating power to administrative agencies if that delegation reduced the prerogative of States to adopt generic rules as PURPA's Title I contemplates. A disincentive to administrative process will undermine the ability of government to achieve many of the tasks which its people seek for it to perform. *See id.* § 1.05. This kind of disincentive to efficient government is unfair to States in light of the need for administrative tribunals, and will destroy their ability to function in a modern federal system. PURPA's Title I should not be upheld because of the Supremacy Clause.

IV. AS A MATTER OF CONSTITUTIONAL POLICY, THE TENTH AMENDMENT SHOULD PROTECT THE FREEDOM OF STATE REGULATORY AUTHORITIES TO REFUSE THE ADDITIONAL REGULATORY RESPONSIBILITIES AND COSTS IMPOSED BY CONGRESS IN PURPA.

National League of Cities and *Virginia Surface Mining* both lead to the conclusion that PURPA violates the Tenth Amendment. Moreover, such a conclusion comports with a responsible view of national power and the Supremacy Clause not only be-

cause it preserves State resources for the legislative process, but also because it requires Congress to bear the burden of national regulatory initiatives. States do not necessarily seek participation in new regulatory schemes because of the costs implicit in additional governmental responsibility. It violates a fundamental sense of Federalism for Congress to demand such participation, even when in the name of providing that States play a role. *See District of Columbia v. Train*, 521 F.2d at 994 n.27. *Cf.* Brief of Appellant at 31-32.

Congress must bear the regulatory burden of its policy initiatives if Federalism is to survive. The Constitution does not allow Congress to transfer the costs of regulating to the States. There is no anomaly in requiring Congress to preempt States if it wishes to engage in regulatory activity rather than force State participation. Cost limitations inherent in federal preemption serve as institutional barriers to the irresponsible use of Congressional power.

These barriers were at work in the enactment of PURPA, but Congress chose to ignore them. It is highly unlikely that from either a political or budgetary standpoint Congress would have preempted regulation of local electric utility operations. *See* Brief of Appellant at 33. If the federal Government cannot bear the financial or political costs of programs such as PURPA, it should not create additional regulatory activity. The existence of the States should not allow Congress to escape responsibility for its decisions. The States are cooperative agents in the federal system, not servants of a federal master. The States do not serve as slaves for federal activity whenever Congress is financially or politically unable to undertake regulatory action. *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 345, 398-99 (1842). Section 210 improperly drafts unwilling State regulatory authorities into the federal energy program by making them responsible for implementation of Congressional policy.

PURPA also transgresses the values of Federalism by requiring hearings on retail ratemaking and service standards under Title I. States must be free to refuse to complete these hearings if Federalism is to play a role in the achievement of efficient

government. This is so because the virtue of Federalism — the ability to experiment — is critical to the development of efficiency. *See Whalen v. Roe*, 429 U.S. 589, 597 (1977); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Furthermore, "[i]t is in the regulatory area that traditional justifications for a federal system — the intrinsic as well as instrumental values of diversity and experimentation which can be achieved through decentralized decisionmaking — find their greatest validity." L. Tribe, "Unraveling *National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services," 90 *Harv. L. Rev.* 1065, 1075 (1977). The invocation of regulatory process should thus be a matter where State decision-making prerogative finds its greatest validity in the federal system.

PURPA destroys these concepts of Federalism. Under Title I, States are denied the prerogative to determine when the regulatory process should be available for the establishment of public policy. Under Section 210, Congress has forced States to bear the enforcement burden and costs for Congressional policies and freed itself from a substantial institution limitation on the unbridled exercise of power.

As a matter of constitutional policy, PURPA therefore violates principles of Federalism and the Tenth Amendment.

V. CONCLUSION.

This Court should declare Title I and Section 210 of PURPA unconstitutional as violations of the well-respected notions of Federalism embodied in the Tenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that, pursuant to Rule 28 of the Rules of this Court, I have this day caused to be served, by first-class mail postage prepaid, three (3) copies of the foregoing Brief of Amici Curiae in Support of Appellees upon the following counsel for the parties to this proceeding: Rex. E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530; Charles A. Moore, General Counsel, Federal Energy Regulatory Commission, Washington, D.C. 20426; Honorable James B. Edwards, Secretary of Energy, Department of Energy, Washington, D.C.; Alex A. Alston, Jr., P.O. Box 1532, Jackson, MS 39205; Hiram C. Eastland, Jr., 600 East Amite Street, Suite 100, Jackson, MS 39202; Joshua Green, P.O. Box 1666, Jackson, MS 39205; and James K. Child, Jr., P.O. Box 651, Jackson, MS 39205.

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October 28, 1981
Birmingham, Alabama